Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-607
MIREE
v.
DEKALB COUNTY, GEORGIA

No. 76-659
PHILLIPS
v.
DEKALB COUNTY, GEORGIA

No. 76-722
FIELDS
v.
DEKALB COUNTY, GEORGIA

No. 76-700
FIREMAN'S FUND
v.
DEKALB COUNTY, GEORGIA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONSE OF DEKALB COUNTY, GEORGIA TO PETITIONS FOR WRIT OF CERTIORARI

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RESPONSE OF DEKALB COUNTY, GEORGIA TO PETITIONS FOR WRIT OF CERTIORARI

I.

INITIAL OBSERVATIONS

Respondent, DEKALB COUNTY, GEORGIA, files this Brief in response to four (4) Petitions for a Writ

of Certiorari: *George Henson Miree, et al* v. *DeKalb County,* Number 76-607, (hereinafter "Miree" Appeal); *Judith Ann Phillips* v. *DeKalb County,* Civil Action Number 76-659 (hereinafter "Phillips" Appeal); *William Michael Fields* v. *DeKalb County,* Civil Action Number 76-722, (hereinafter "Fields" Appeal); and *Fireman's Fund Insurance Company* v. *DeKalb County,* Civil Action File Number 76-700, (hereinafter "Fireman's Fund" Appeal).

Respondent would point out that the enclosed Brief will contain its response to all four (4) of the above-noted Petitions. This inclusive response will create obvious problems with four (4) separate records and positions, which the Respondent will attempt to minimize by as few references to the separate records and contentions as possible.

II.

FACTUAL SETTING

The Petitions presently before this Court arise out of events which occurred on or about February 26, 1973. Each of the actions presently on Petition before this Court, were instituted, from November, 1973, to May, 1974, in the United States District Court for the Northern District of Georgia, Atlanta Division, against Respondent herein and the United States. Each of the Petitions alleged diversity of citizenship jurisdiction, as it related to Respondent DeKalb County, Georgia. Moreover, each of the Complaints alleged that Respondent was liable to Petitioners under the theories of negligence, nuisance, and breach of Federal Grant Agreements to which the Petitioners were alleged third party intended beneficiaries.

The Respondent, concurrently with the filing of responsive pleadings, filed Motions to Dismiss each of the subject actions, upon the theory that DeKalb County, Georgia, was immune from suit in these actions under the Constitution and Laws of the State of Georgia. The Honorable William C. O'Kelley, United States District Judge, granted the Respondent's Motions to Dismiss in unreported Orders dated June 27, 1974, and September 24, 1974. District Judge, O'Kelley held that under Georgia Law, DeKalb County, Georgia, was immune from suit in the present actions. Thus, the governmental immunity of the County precluded the present actions under the theories of nuisance, negligence, and contractual beneficiaries.

The present Petitioners, appealed the entry of judgment, to the United States Court of Appeals for the Fifth Circuit. The initial panel of Circuit Judges Godbold, Dyer and Morgan, held in *Miree* v. *United States,* 526 F.2d 679 (5th Cir. 1976), that DeKalb County, Georgia was immune from suit under the Petitioner's theories of negligence and nuisance. However, that panel split over the issue of the rights of the Petitioners as intended beneficiaries of the Federal Grant Agreements in issue. A re-hearing en banc was granted, and in *Miree* v. *United States,* 538 F.2d 643 (5th Cir. 1976), the majority of the Court adopted the previous dissent of Circuit Judge Dyer. The effect of these opinions was that the rulings of District Judge O'Kelley, and the judgment entered thereon, dismissing the Respondent from the present actions, was affirmed.

III.

STATEMENT OF THE CASE

The Respondent does question many of the "facts" listed in the various Petitions, as lacking support in the record before this Court, or the record that was before the Fifth Circuit. The Respondent will not burden this Court or utilize its limited pagination resources, by calling this Court's attention to numerous conclusory allegations and unwarranted deductions of fact set forth in the various petitions. The Respondent adopts as its factual statement, the factual recitations contained within the two (2) Orders of District Judge William C. O'Kelley, and the factual background set forth by Circuit Judge Morgan, in the panel opinion reported at 526 F.2d 679, at 681.

IV.

ARGUMENT AND CITATION OF AUTHORITY

A.

Under the Constitution and Statutes of Georgia, Respondent Is Immune from Suit in the Present Actions

In Georgia, the governmental immunity of DeKalb County, Georgia, has its basis both in the Georgia Constitution; Georgia Code Annotated Section 2-3710, (Georgia Laws 1973, p. 1489; ratified by electorate, 1974 General Election), and in the statutory law, Georgia Code Annotated Section 23-1502. The latter Code Section states, clearly and precisely, as follows:

> "A County is not liable to suit for any cause of action unless made so by statute."

Several of the Petitioners have suggested that Georgia Code Annotated Section 23-1502, is unconstitutional in its application to the facts at bar. Respondent calls

this Court's attention to the Trial Court records of each of the subject actions, where a brief review of same will evidence a lack of proper foundation for several of the Constitutional attacks in this Court. Even if the attack possesses sufficient foundation, the Supreme Court of Georgia in numerous recent decisions has shown that governmental immunity has existed in Georgia, since 1784, and that the doctrine violates neither the Georgia nor the Federal Constitutions. *Crowder* v. *Department of State Parks,* 228 Ga. 436, 185 S.E.2d 908 (1971); *Williams* v. *Georgia Power Company,* 233 Ga. 517, 212 S.E.2d 348 (1975); *Revels* v. *Tift County,* 235 Ga. 333, 219 S.E.2d 445 (1975). Moreover, the Supreme Court of Georgia has held that the recent constitutionalization of the governmental immunity doctrine in Georgia demands that the immunity rule is no longer open to judicial abrogation. *Sheley* v. *Board of Public Education,* 233 Ga. 487, 212 S.E.2d 627 (1975); *Revels* v. *Tift County,* 235 Ga. 333, 219 S.E.2d 445 (1975).

Further, reference is made in several petitions that the distinction between county and municipal immunity under Georgia Law is violative of Constitutional requirements. Even if this argument had been properly raised in the Trial Court, which Respondent contends is not the case, this argument would find little support. The Supreme Court of Georgia, as recently as 1972, unanimously held in *Troup County Electric Membership Corporation* v. *Georgia Power Company,* 229 Ga. 348, 191 S.E.2d 33 (1972), that under Georgia Law, counties are "arms of the State" bearing the State's burdens within their localities. On the other hand, municipalities, as legislative creatures, can select from the various powers and duties available, and reject those liabilities which will either be inapplicable for the

particular location or simply unwanted by the incorporators. The distinctive features and liabilities of each are rational and embedded in the law of Georgia. It should be noted that District Judge O'Kelley's opinion, as well as that of Circuit Judge Morgan, which was subsequently adopted by the en banc Court, referred to and approved this legal distinction.

B.

Petitioners' Complaints Fail To State a Claim or Cause of Action Upon the Theories of Negligence and Nuisance

Respondent will not burden this Court with extensive written argument on the Petitoners' theories of negligence and nuisance. Suffice it to say that District Judge O'Kelly and the entire Fifth Circuit Court of Appeals, including Circuit Judges Morgan and Hill from Georgia, have held that the Respondent is not liable under either of Petitioners' theories. These opinions are clearly supported by Georgia Law and require no further written argument to this point.

C.

Petitioners' Complaints Fail To State a Claim or Cause of Action Upon the Theory that Petitioners Are Third Party Intended Beneficiaries to the Federal Grant Agreements

Respondent DeKalb County, Georgia, has consistently argued that under the application of either Georgia Law or Federal Law, it is not liable to the Petitioners. The Petitioners' assertions that the majority of the Fifth Circuit Court of Appeals reviewed only Federal Law is incorrect. Judge Dyer's dissent, which was subsequently adopted, specifically noted that if Georgia Law was applied, the result would be the same. 526 F.2d, at p. 686 (footnote 1).

1.

Review Of Georgia Authority

In reviewing Georgia law, Respondent would again call this Court's attention to the previously discussed Constitutional and statutory governmental immunity of this entity. Respondent takes strong issue with the suggestions contained in several petitions and the dissent of Judge Morgan, wherein it is suggested that Georgia Law would permit the present actions to proceed under the theory of an intended third party beneficiary. In Georgia, the imunity rule is unavailable to a county being sued by a contracting party for a breach of a valid contract. *Decatur County* v. *Prayton, Howton and Wood Contracting Company,* 163 Ga. 929, 137 S.E. 247 (1927). The present action does not involve contracting parties, but, on the contrary, involves strangers to the contract. With the addition of these strangers to the contract as alleged third party intended beneficiaries, the immunity and non-liability of the county is re-imposed. *Purser* v. *Dodge County,* 188 Ga. 250, 3 S.E.2d 574 (1939); *Backus* v. *Chilivis, Commissioner,* 236 Ga. 500, 224 S.E.2d 370 (1976); *Lee* v. *Petty,* 133 Ga. App. 201, 210 S.E.2d 383 (1974); *McWhirter Material Handling Company, Inc.* v. *Georgia Paper Stock Company, Inc.,* 118 Ga. App. 582, 164 S.E.2d 852 (1968), and *Williams* v. *Georgia Power,* 233 Ga. 517, 212 S.E.2d 348 (1975), [Supreme Court of Georgia re-consideration of the issues presented in *Hancock County* v. *Williams,* 230 Ga. 723, 198 S.E.2d 659 (1973), cited by dissent and Petitioners].

The above-noted decisions also hold that for a particular stranger to a contract to have standing to enforce the contract, it must be clearly manifested in the

contract that it was made for his intended benefit. Moreover, the mere fact that the third party might benefit from performance of the agreement is not sufficient. *Backus* v. *Chilivis, Commissioner, supra.* The Petitioners, as members of the public, were incidental to the contract formation, incidental to the contract execution and incidental to the contracting parties. Therefore, under Georgia Law, the Petitioners would not have sufficient standing to enforce the contract, even if the county's governmental immunity were improperly questioned. It is to be noted that the Georgia approach is consistent with and applicable of the Restatement of Contracts, Section 145.

2.

Review Of Federal Authority

Moving to a review of Federal Law, Respondent contends that its governmental immunity, created under Georgia Law, is equally applicable to any review of Federal authorities. The governmental immunity of a state or a political subdivision thereof, is not waived by its entry into a Federal area or its subjection to Federal "Overlordship", *Intracoastal Transportation, Inc.* v. *Decatur County, Georgia,* 482 F.2d 361 (5th Cir. 1973); *Red Star Towing & Transportation Company* v. *Department of Transportation of State of New Jersey,* 423 F.2d 104 (3rd Cir. 1970); *Rogers* v. *Ray Gardner Flying Service, Inc.,* 435 F.2d 1389 (5th Cir. 1970); *Williamson Towing Company* v. *Illinois,* 534 F.2d 758 (7th Cir. 1976). Any suggested reliance upon the decision in *Parden* v. *Terminal Railway Company,* 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964), and its short-lived progeny, would be and is misplaced. See *Employees* v. *Department of Public Health and Welfare,* 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973), and *Edelman* v. *Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

Respondent would further contend that the Petitioners have not established, nor can they establish that they were intended beneficiaries to the Federal Grant Agreements in issue. The Restatement of Contracts, Section 145, noted previously, provides, as follows:

> "A promisor bound to the United States or to a state or municipality by contract to do an act or render a service to some or all the members of the public is subject to no duty under the contract to such members to give compensation for injurious consequences of performing or attempting to perform it, or failing to do so, unless,
>
> (a) An intention is manifested in the contract, as interpreted in light of the circumstances, surrounding its formation, that the promisor shall compensate members of the public for such injurious consequences . . ."

The Restatement rule was clearly fashioned upon decisions such as this Court's decision in *German Alliance Insurance Company* v. *Home Water Supply Co.,* 226 U.S. 220, 33 S.Ct. 32, 57 L. Ed. 195 (1912), which required that the contract disclose a "direct" benefit to the third party, in order for that third party to have standing to enforce the contract. Numerous Federal Court decisions support this approach. *Harlib* v. *Lynn,* 511 F.2d 51 (7th Cir. 1975); *Commonwealth of Pennsylvania* v. *National Association of Flood Insurers,* 378 F. Supp. 1339 (M.D. Pa. 1974); *Stanturf* v. *Sipes,* 224 F. Supp. 883 (W.D. Mo 1963), affirmed 335 F.2d 224 (8th Cir. 1964); *Lobianco* v. *Valley Forge Military Academy,* 224 F. Supp. 395 (E.D. Pa. 1963), affirmed

331 F.2d 851 (3rd Cir. 1964), (as well as the decisions cited by Circuit Judge Dyer). This approach is very consistent with this Court's recent decision in *United States* v. *Orleans,* — U.S. —, 96 S.Ct. 1971, 48 L.Ed. 2d 390 (1976), wherein this Court unanimously held that the grantor of federal funds did not subject itself to "countless unidentifiable classes of beneficiaries," id, 48 L. Ed. 2d, at p. 399. Certainly, if the grantor is not liable to "countless unidentifiable classes of beneficiaries," the grantee of said funds, who itself is cloaked with unwaived governmental immunity, equally is not liable.

Respondent would further contend that even if this Court were to determine that the Petitioners were third party intended beneficiaries of the Federal Grant Agreements in issue, then the rights of the Petitioners are no greater than the rights of the contracting parties. The only remedies in the Grant Agreements in issue are the termination of funds by the grantor and possible enforcement of performance obligations. It is elementary law that a third party can have no greater rights than those held by the contracting parties. *Deal* v. *Chemical Construction Company,* 99 Ga. App. 413, 108 S.E. 2d 746 (1959); *Simmons* v. *Western Assurance Company,* 205 F.2d 815 (5th Cir. 1953), Thus, the rights accorded the contracting parties are not sufficient basis for the maintenance of the present death, personal injury and property damage actions.

Moreover, no private cause of action should be implied from either the silent Grant Agreements or the silent enabling legislation. *Cort* v. *Ash,* 422 U.S. 66, 95 S.Ct. 2080, 45 L. Ed. 2d 26 (1975). Petitioners' assertion of the applicability of the decision in *City of*

Inglewood v. *City of Los Angeles,* 451 F.2d 948 (9th Cir. 1972), is clearly misplaced, as that case was a class action in the nature of an eminent domain or "taking" action, as it related to noise problems, and applying those principles to the facts at bar would be inappropriate. As for particular decisions in the aviation area which did not create private causes of action, see *Moungey* v. *Brandt,* 250 F. Supp. 445 (W.D. Wis. 1966); *Rosdail* v. *Western Aviation Company, Inc.,* 297 F. Supp. 681 (D. Colo. 1969); *Moody* v. *McDaniel,* 190 F. Supp. 24 (N.D. Miss. 1960); *Morrison* v. *Jack Richards Aircraft Company,* 328 F. Supp. 580 (W.D. Okla. 1971); *Rogers* v. *Ray Gardner Flying Service, Inc.,* 435 F. 2d 1389 (5th Cir. 1970); *McCord* v. *Dixie Aviation Corp.,* 450 F.2d 1129 (10th Cir. 1971); *Polansky* v. *Transworld Airlines, Inc.,* 523 F.2d 332 (3rd Cir. 1975). (as well as the decisions cited by Circuit Judge Dyer).

V.

REASONS FOR DENYING THE PETITIONS FOR A WRIT OF CERTIORARI

Respondent DEKALB COUNTY, GEORGIA, after briefly acquainting this Court with its position on the legal issues raised by the several Petitions pending before this Court, hereby sets forth its reasons why the Petitions should be denied:

1.

First and foremost, the opinion and judgment of the Honorable William C. O'Kelley, United States District Judge, Northern District of Georgia, Atlanta Division and of the United States Court of Appeals for the Fifth Circuit, are correct, as a matter of law.

2.

The opinion and judgment of District Judge O'Kelly and of the Fifth Circuit Court of Appeals, is clearly consistent with and supported by numerous Supreme Court of Georgia and Court of Appeals of Georgia decisions, cited in the earlier portions of this Brief. Moreover, each particular legal issue raised in the subject Petitions has been recently reviewed by the Appellate Courts of Georgia and adjudged against Petitioners' position herein.

3.

The opinion and judgment of District Judge O'Kelley and of the Fifth Circuit Court of Appeals is clearly consistent with and supported by a multitude of decisions of this Court and other Federal Courts, several of which have been previously cited in this Brief.

4.

Respondent further contends that with this Court's recent unanimous decision in *United States* v. *Orleans*, — U.S. — 96 S. Ct. 1971, 48 L. Ed. 2d 390 (1976), the issues that could be brought before this Court in the subject Petitions, are resolved and, therefore, are without significance.

5.

Respondent lastly contends that no significant or unique questions surrounding either the Federal Constitution or Constitution of Georgia are properly brought before this Court or are properly before this

Court, requiring any substantative resolution by this Court.

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